(1) Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARY BUCHIGNANI,

PETITIONER,

V.

VINING-SPARKS, IBG, A LIMITED PARTNERSHIP AND VINING SPARKS SECURITIES, INC.,

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On Petition for Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

I. WHETHER THE STANDARD OF REVIEW APPLIED BY THE SIXTH CIRCUIT TO AN ARBITRATOR'S DECISION IN A CIVIL RIGHTS CASE, ESPECIALLY WHERE THE ARBITRATOR GIVES NO REASON FOR THE DECISION, IS TOO DEFERENTIAL.

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Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit in Mary Buchignani v. Vining-Sparks, IBG, a Tennessee Limited Partnership and Vining-Sparks Securities, Inc., is unreported and set forth in the Appendix attached hereto. (App. 13-A).

The Order of the United States District Court for the Western District of Tennessee, denying Mrs. Buchignani's Motion to Vacate NASD Arbitration Award and granting the Defendants' Motion to Confirm Award, in Mary Buchignani v. Vining-Sparks, a Tennessee Limited Partnership; Vining-Sparks Securities, Inc., a Tennessee Corporation; and James L. Vining, Individually is unreported and set forth in the Appendix attached hereto. (App. 1-A).

Basis for Jurisdiction

On May 1, 2000, the court of appeals denied Mrs. Buchignani's timely filed petition for rehearing and request for rehearing en banc. (App. 28-A). The judgment sought to be reviewed was entered on March 2, 2000. This petition for writ of certiorari is filed within ninety (90) days from the date of the denial of the petition for rehearing and suggestion for rehearing en banc. 28 U.S.C. § 2101(c) (1994).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1) (1994).

Constitutional and Statutory Provisions Involved

Civil Rights Act of 1991, § 118

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title (enacting section 1981a of this title and amending this section, sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111, and 12112 of this title, and section 626 of Title 29, Labor).

42 U.S.C. § 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Statement of the Case

Mrs. Buchignani was terminated from her employment with Vining Sparks IBG [hereinafter referred to with Vining Sparks Securities, Inc. as "Defendants"] on March 20, 1995. In September 1995, Mrs. Buchignani filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging age, sex and religious discrimination and harassment, as well as retaliation. She received a Notice of Right to Sue on March 7, 1996, and filed her Complaint in the United States District Court for the Western District of Tennessee on June 5, 1996.

On June 24, 1996, the Defendants moved the district court to stay the pending litigation and compel arbitration of Mrs. Buchignani's federal civil rights claims. By Order entered August 14, 1996, the District Court found that Mrs. Buchignani's U-4 form and the National Association of Securities Dealers' ("NASD") regulations, together with the federal policy favoring arbitration, permitted the arbitration of her civil rights claim.

This matter was subsequently heard by the NASD arbitration panel on November 5th, 6th and 7th, 1997. After hearing multiple and unrebutted witnesses testify as to both the severity and pervasiveness of Mrs. Buchignani's claims of sexual harassment, the NASD panel decided with absolutely no discussion or reasoning "that the Claimant failed to carry her burden of proof and her claims for damages are denied with prejudice." Decision of the NASD Panel, set forth in the Appendix attached hereto at 25-A. The NASD panel offered no explanation for its decision.

On March 6, 1998, Mrs. Buchignani moved the district court for an Order vacating the decision of the NASD panel. The Defendants similarly moved the district court to confirm the award of the NASD panel. By Order entered October 30, 1998, the district court denied Mrs. Buchignani's

motion and granted the Defendants' request to confirm the arbitration award.

These decisions were subsequently appealed, and on March 2, 2000, the panel entered a per curiam decision finding that the court's prior decision in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418 (6th Cir. 1995), was controlling precedent and "only an en banc review" could result in a reversal of the lower court's decision. App., p. 20-A. Mrs. Buchignani's timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 1, 2000.

Material Facts

Mrs. Buchignani was employed as a Senior Vice President and registered representative for Vining-Sparks IBG, Limited Partnership, from August 1982 until March 20, 1995, when her employment was involuntarily terminated. From 1984 until the time of her termination, Mrs. Buchignani served as a registered representative in the area of securities trading for Defendants.

In 1984, Mrs. Buchignani became the first female salesperson employed at Vining-Sparks. It is undisputed that at no time either, during or after her employment with Defendants, did women ever comprise a significant percentage of the broker force.

The working atmosphere on the sales floor where Mrs. Buchignani was employed as a salesperson was one marked by frequent coarse and vulgar language, dirty jokes and numerous conversations centered around sex acts. At the NASD arbitration hearing, Mrs. Buchignani presented the unrebutted testimony of Jacqueline Obenhuber, a former employee of Defendants. Mrs. Obenhuber testified quite graphically that "when [women] were on the sales floor, we basically tried to wear an armor..." because

> [w]e dreaded going out on the sales floor.....You wanted to make sure that your clothes were on right, that your slip wasn't showing, nothing was wrong and they just didn't have anything to harass you about. But there were certain lanes of traffic you had to walk through, and there were people in those lanes that just acted like construction workers on a construction site. You just had to get through quick, even hold your breath, get through there, get out. And it was not something that you ever did voluntarily.

This testimony was buttressed by the unrebutted testimony of Jeanne Moulton, a current employee of Defendants who testified that the men on the sales floor where Mrs. Buchignani worked "weren't restrained necessarily in their comments about what you looked like that day, what you're wearing, or anything else.... They felt free to say just about anything they wanted to...as women walked across the floor." These jokes, stories and language always related to women in a negative context and resulted in the female sales reps being poked, touched, and referred to in derogatory terms while male sales reps were not similarly treated.

In February of 1994, Mrs. Buchignani took the complaints of harassment she and the other females on the sales floor were experiencing to James Vining, the President and Chief Executive Officer of Vining-Sparks. Specifically, Mrs. Buchignani informed Mr. Vining that the female employees were being subjected to offensive language and jokes and were being treated in a disrespectful manner. Mr. Vining took no remedial action at all.

Mrs. Buchignani continued to perform her job in a satisfactory manner throughout the spring and summer of 1994. In August of 1994, she approached Mr. Vining again about this problem in the workplace. She sought his interest

in a minority owned business venture, wherein females would be the owners and which could possibly cure the cavalier attitude toward women in the workplace. Mr. Vining responded that such ventures were not meant for "rich white little Italian girls, like you," but after further protest by Mrs. Buchignani, he requested that she conduct research on the idea. After Mrs. Buchignani devoted many hours towards researching the idea, Mr. Vining gave the minority business venture to a male, Tony James. At the time he assigned the position, Mr. Vining informed Mrs. Buchignani that she would "work for" Tony James, even though he was forced to admit that Mrs. Buchignani was more qualified than Mr. James for the position. Mr. Vining again failed to address Mrs. Buchignani's concerns about the working environment.

Also during her tenure with Vining-Sparks, Mrs. Buchignani sought several promotions but never advanced past the position of Senior Vice President, a position at which her compensation and responsibilities did not exceed those of a regular broker/salesperson. She clearly informed Mr. Vining and other management executives of her desire and qualifications for promotion. Instead, less experienced male employees were hired to fill executive management positions over Mrs. Buchignani. Mrs. Buchignani was never seriously considered, and was overlooked, for various promotions because she was not of the "correct" gender. An example of this was the filling of the Lindsey Hill position.

In late November 1994, Lindsey Hill, Director of Sales/Executive Vice President, resigned from his position. Despite Mrs. Buchignani's February 1994 meeting with Mr. Vining, she was never informed of the opening, nor was she interviewed for the position. Instead a younger, less-experienced male, Randy Wade, was given the position. Mr. Wade had previously been a subordinate to Mrs. Buchignani, and she had devoted substantial time and effort to his training. Additionally, Mr. Wade did not have any experience in selling or trading securities, knew none of the business customers, and

had been employed in the Strategies Department at Vining-Sparks. Mr. Wade, however, was part of the "good old boy" network, which discriminated and oppressed women, and thus he was promoted over a more qualified candidate, Mrs. Buchignani.

Immediately after the announcement of Mr. Wade's selection, Mrs. Buchignani again met with Mr. Vining to discuss the continued discriminatory treatment of women in the workplace. In response to Mrs. Buchignani's inquiry as to why she was not selected, Mr. Vining stated she was "too emotional" and "cried too much." In sum, the Hill position, as well as others, had been given to men with less experience and fewer qualifications.

After meeting with Mr. Vining to discuss her denial of the Hill position, Mrs. Buchignani began to manifest symptoms of psychological illness directly and proximately caused by the treatment she was receiving at work. Her health began to deteriorate substantially. Her treating doctor, Dr. Barbara Chamberlin, testified that Mrs. Buchignani's illness was precipitated by the stress that she experienced over her job situation, including the harassment and discrimination that she was forced to endure. Dr. Chamberlin testified that Mrs. Buchignani was suffering from manic depressive illness in a mixed state with paranoid features. In addition, Dr. Chamberlin testified that Mrs. Buchignani reported frequent crying spells, depressed mood, low energy, increased desire for sleep, disorganization and not being able to complete and function in activities at home that she normally had been able to do without difficulty. Dr. Chamberlin also opined that the precipitating factor in the manifestation of these symptoms was extraordinary stress that Ms. Buchignani experienced in the work situation, a direct causal link. According to the doctor, Mrs. Buchignani suffered from an "extra stress" that was different from her everyday, ordinary stress. The doctor explained that she was very career oriented, very invested in her work, and that Mrs. Buchignani "felt shattered that she had

had this falling out with her work environment and that—and my feeling was that that was the key stress that brought the onset of the illness." Furthermore, Dr. Chamberlin testified to these opinions "to a reasonable degree of medical certainty," stating that the illness was "more likely than not" caused by Mrs. Buchignani's stress at work.

As a result of the continued, pervasive harassment and discrimination, Mrs. Buchignani reached a point where she could no longer tolerate the work environment, and it became physically impossible for her to get work done, although she continued to try to perform her work duties.

In November of 1994, some eight months after Mrs. Buchignani first brought the abusive and discriminatory environment to Mr. Vining's attention, Mr. Vining issued a one paragraph sexual harassment memorandum. Subsequently, Karen Cox, a human resources employee of Defendants, issued a second short memorandum. Both were treated as a joke by the men on the sales floor. In fact, one of the salesmen, a supervisor, said, "Does this mean we can't ask ... the women for blow jobs?"

Throughout February and March of 1995, Mrs. Buchignani continued to do her best to perform her duties as a bond salesperson, despite the fact that her mental health had deteriorated. In March of 1995, Mrs. Buchignani had grossed $50,000.00 in the first two weeks. An incident occurred at this point that eventually led to her being relieved of her job.

On March 9, 1995, Mrs. Buchignani was talking on the telephone trying to complete a trade. Dan Green, a fellow bond trader, was carrying on a loud conversation while Mrs. Buchignani was on the telephone. Mr. Green stressed the phrase "bond man" several times, disrupting Mrs. Buchignani and distracting her from her bond trade. Once her transaction was complete, Mrs. Buchignani advised Mr. Green that he should use the term bond "person" as there were both male and female bond traders on the floor. In response to this incident Mr. Vining reprimanded Mrs.

Buchignani, calling her a "disruptive force" and telling her that he was going to move her desk because she had upset Dan Green. Because of her objections to the abusive work environment, Mrs. Buchignani was being singled out and segregated.

A few days later in that same month Mr. Vining again approached Mrs. Buchignani asking, her to meet with him in his office. When she arrived in Mr. Vining's office, Karen Cox was present. It was here that Mr. Vining informed her that he was placing her on "mandatory leave." Mr. Vining took away Mrs. Buchignani's accounts and assigned them to another salesperson. He also instructed her not to go back to the sales floor.

Thereafter, Defendants never attempted to contact Mrs. Buchignani in regards to the "mandatory leave" on which they were allegedly placing her. They further treated her as terminated by filing the appropriate documents with the NASD, themselves filling in the response that she had quit. At the time, and ever since, Mrs. Buchignani has affirmatively maintained that she was fired.

Reasons for Granting the Writ

I. The Sixth Circuit Court of Appeal's deferential standard of review conflicts with the reasoning of the D.C. and Fifth Circuit Courts of Appeals' analysis.

In upholding the arbitration panel's award in the present case, the Sixth Circuit affirmed the district court's decision, placing a "tremendous obstacle" in the path of any party seeking a review of an arbitration decision. The Sixth Circuit determined that the "manifest disregard of the law" standard set forth in Merrill Lynch, Pierce, Fenner & Smith,

Inc. v. Jaros, 70 F.3d 418 (6th Cir. 1995) is appropriate for reviewing mandatory arbitration of civil rights claims. App. 19-A.

In Merrill Lynch, the Sixth Circuit was faced with an essentially commercial dispute. The fact pattern showed that the arbitrator in that dispute "gave no explanation for the holding of the award." Id. at 421. The Sixth Circuit went on to affirm the determination in Merrill Lynch that when the arbitrator gives no explanation of its award

> a party seeking to have the award set aside faces a tremendous obstacle. If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.

Id.

As the Supreme Court pointed out in Gilmer v. Interstate/Johnson Lane Corp., "'[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'" Gilmer, 500 U.S. 20, 26 (1991), quoting Mitsubishi v. Motors Corp. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). Thus, a party cannot be required to forego the legal rights to which the party would be entitled in a judicial forum. Contrary to the impact of the Sixth Circuit's standard of review, this Court did not adopt a "grand presumption in favor of arbitration." Farand v. Lutheran Brotherhood, 993 F.2d 1253, 1255 (7th Cir. 1993). This Court also did not even suggest that arbitration decisions are immune from a meaningful judicial review or that the level of deference applied by the district court and affirmed by the Sixth Circuit Court of Appeals was appropriate. In fact, the Court specifically found that the level of review must be sufficient

to ensure that the arbitrators comply with the requirements of the statute at issue. Id. at 32 n.4.

These factors were all considered by the D.C. Circuit Court of Appeals in its thoughtful analysis of Cole v. Burns Intern. Security Servs., 105 F.3d 1465 (D.C. Cir. 1997).[1] The Cole court considered the exact issue present in this case and determined that, while one may compel an arbitration based on a pre-dispute waiver of a federal civil rights claim, it can only be compelled so long as there are adequate safeguards post-arbitration to ensure that the remedial scheme of the civil rights statute has been effectively vindicated.

Based on this, the Cole court found that the standard of review "must be defined by reference to the assumptions underlying the [Supreme] Court's endorsement of arbitration." One of those assumptions was that the agreement to arbitrate cannot compel a party to forego the rights afforded by the statute. Id. at 1487. See also Williams v. Cigna Financial Advisors, 197 F.3d 752 (5th Cir. 1999) (reaching same result for same reason).

In light of this, it is submitted that only a standard of review which "is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied, statutory law" would comply with the clear mandate of Gilmer. Cole, 105 F.3d at 1487; Williams 197 F.3d, at 754. In turn, this standard of review cannot be the deferential standard applied by the district court, but rather must examine not only the result of the arbitration panel, but also the reasons for the decision reached to determine if the statutory claim being presented was indeed dealt with as mandated by the federal law. When, as here, the arbitrator gives no reason for his or her decision, that decision must be set aside because it is

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[1] Judge Harry Edwards, the author of the Cole decision, is considered to be one of this nation's foremost authorities on arbitration and has repeatedly advocated its use. See, Harry Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 Harv. L. Rev. 668 (1986).

impossible for anyone to determine if the arbitrator properly interpreted and applied the law. Nowhere is the review more crucial than in the area of the vindication of an individual's right to be free from discrimination.

As the Williams court pointed out, the Court in Gilmer did not intend for a prospective waiver of an individual's right to a court's decision to result in the "relinquishment [of] much of that right's practical value." Id.

Based on this, the conflict between the Fifth and D.C. Circuit's more stringent standard of review and the Sixth Circuit's extremely lenient standard is clear. The import of establishing a clear standard of review of arbitration decisions from civil rights claims is clear from the recent attention this area has received from this Court. Therefore, this Court should grant Mrs. Buchignani's Petition for Writ of Certiorari.

II. The Sixth Circuit Court of Appeal's deferential standard of review conflicts with this Court's decision in Gilmer v. Interstate/Johnson Lane Corp.

In Gilmer, the United States Supreme Court affirmed the mandatory arbitration of employment disputes based on the underlying presumption that the party compelled to arbitrate is not also forced to forego the rights afforded by the statute under which he is claiming. Gilmer, 500 U.S. at 26. The parties are only altering the forum in which the claim is heard. Id. This Court went on to conclude that so long as the plaintiff may effectively vindicate her federally guaranteed rights through arbitration, there will be no impairment of either the remedial or deterrent functions of the statute at issue. Id. at 29.

In Gilmer, the Court relied heavily on the precedent of Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). The Mitsubishi Court ruled that prior

to a court compelling arbitration, that arbitration must be compatible with the remedial scheme of the federal statute being enforced through the arbitratal, as opposed to judicial, forum. In enforcing the arbitration agreement, the Court specifically relied upon the assurance that upon review the judiciary would ensure that the parties had been able to fully vindicate their rights in that forum. Id. at 635-38.

As has been previously pointed out, both the D.C. and Fifth Circuits agree that it is beyond rational dispute that the right of any litigant in a federal district court is the right to have an appellate court conduct a meaningful review of the final decisions of the district court. 28 U.S.C. § 1291 (1994).

In Mrs. Buchignani's case, however, this right to meaningful appellate review is effectively denied. Any party seeking to appeal an arbitration decision is bound in the Sixth Circuit by an extremely deferential standard of review, which was followed by the district court in this case. Based on this, it is clear that the underlying assumption of the Supreme Court in Gilmer (that the parties' rights would not be meaningfully altered by the change in forum) is not present in this case.

Furthermore, as in the present case, the standard of review utilized by the Sixth Circuit is artificially heightened by the arbitrator's refusal to explain the basis for its decision. Given this heightening of an already deferential standard of review, it is clear that the Sixth Circuit's affirmation of the district court's decision conflicts with this Court's decision in Gilmer.

III. The decision of the Sixth Circuit Court of Appeals conflicts with the legislative history of the Civil Rights Acts of 1964, 1972 and 1991.

The Civil Rights Act of 1964 is undeniably a historic piece of legislation. Title VII of that Act was passed to

address a systemic social ill which was part of American culture and to guarantee every American equal employment opportunities and to protect her fundamental Constitutional right to equal protection. H.R. Rep. No. 914, 88d Cong., 1st Sess., pt. 1 (1963). As President John F. Kennedy told the nation on June 11, 1963, when he stated his intention to introduce a comprehensive civil rights bill, "We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution." President John F. Kennedy's Radio and Television Report to the American People on Civil Rights, Pub. Papers 468 (1963). The ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, William McCulloch, one of the individuals responsible for working out the compromise which ultimately became the 1964 Civil Rights Act, stated that this Act was designed "to secure to all Americans the equal protection of the laws of the United States and of the several states." This same intent was reflected by the 1964 Report of the House Committee on Education and Labor, which found:

> In short, this act proposes active steps toward achievement of basic constitutional and moral transforming from the theoretical into the actual the fundamental principles which are the very foundation of American democracy - and undertakes to remove deficiencies and to attain positive benefits necessary to internal well-being and to continued world leadership.

H.R. Rep. No. 1370, 86th Cong., 1st Sess., pt. 5 (1962).

The Congressional intent to entrust the resolution of civil rights disputes to the courts was more clearly enunciated in 1972 with the passage of the Equal Employment Opportunities Enforcement Act. The 1972 House Committee on Education and Labor stated that

> [t]he appropriate forum to resolve civil rights questions, questions of employment

> discrimination as well as such matters as public accommodations, school desegregation, fair housing, and voting rights, is a court.

H.R. Rep. No. 238, 92nd Cong., 1st Sess., pt. I, at 62-63 (1971).

When Congress again revisited the 1964 Act in 1991, it passed the Civil Rights Act of 1991 to "restore the strength of federal equal employment protection". H.R. Rep. No. 40(I), 102d Cong., 1st Sess., 15-16 (1991), which contained 118 to provide,

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, *reprinted* in notes to 42 U.S.C. § 1981 (1994). There are two points on which § 118 plays in this analysis.

First, the legislative history of § 118 clearly demonstrates that while Congress was encouraging the use of alternative dispute resolution as a means concluding litigation of this nature, it was not endorsing ADR as a replacement for judicial review. The House Committee, after stating that the purpose of section 118 was to indicate an intent "to supplement, not supplant, the remedies provided by Title VII," stated,

> Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This

> view is consistent with the Supreme Court's interpretation of Title VII in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

H.R. Rep. 40(I), 102nd Cong., 2nd Sess., (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 549, 635. This section specifically rejected an earlier version which encouraged the use of ADR "in place of judicial resolution." H.R. Rept. 40(I), at 104. Congress felt that such an abrogation of the individual's right to have his or her dispute reviewed by a member of the judiciary was contrary to the law and "American workers should not have to be forced to choose between their jobs and their civil rights." Id.

Second, at the time of the debate and drafting of § 118 the state of the law was clearly Alexander v. Gardner-Denver, 415 U.S. 36 (1974). The Gardner-Denver decision was specifically supported by Chairman Edwards of the House Committee on Education and Labor, even after the Gilmer decision was pronounced. 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991)(statement of Rep. Edwards). The Gardner-Denver court specifically found that

> [t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal.

Id., at 56. Clearly, the Sixth Circuit's deferential standard of reviews is inconsistent with clear legislative intent.

Against this backdrop of clear legislative pronouncements, this Court has repeatedly found that federal courts play an integral role in the enforcement of civil rights. In Kremer v. Chemical Constr. Corp., this Court found that "federal courts were entrusted with ultimate enforcement responsibility" of Title VII. 454 U.S. 461, 479 n.20 (1982).

In New York Gaslight Club, Inc. v. Carey, this Court similarly found that "the ultimate authority to secure compliance with Title VII resides in the federal courts." 447 U.S. 54, 64 (1980). This same position was again supported in Gardner-Denver, when the Court declared that all courts in the federal system "should ever be mindful that Congress. . .thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." 415 U.S. at 60 n. 21 (emphasis added).

IV. The Sixth Circuit Court of Appeal's deferential standard of review conflicts with important public policy concerns.

The case principally relied upon by the Sixth Circuit for support of its shockingly narrow scope of review was Merrill Lynch, Pierce, Fenner & Smith v. Jaros, 70 F.3d 418 (6th Cir. 1995). In that case the plaintiff, Stanley Jaros, had placed an initial investment of $472,601.00 with a request for a conservative investment strategy that would maintain the initial investment and allow for long-term appreciation. Id. at 419. As a part of his agreement with Merrill Lynch, Mr. Jaros agreed to arbitrate any disputes which arose between them. Id. Approximately three years later Mr. Jaros pulled his accounts from the defendants after their value had dropped to $344,382.00. Id. Mr. Jaros subsequently sought arbitration of his claims against the defendants. Id. at 420. After losing in arbitration and at the district court, the defendants sought appellate relief from the results achieved in their selected forum.

The Sixth Circuit, when faced with the issue of the proper scope of review, turned for guidance to the case of Anaconda Co. v. District Lodge No. 27, 693 F.2d 35 (6th Cir. 1982). Relying on Anaconda Co. this Court upheld an

extremely deferential standard of review and affirmed that manifest disregard of the law provides only a very narrow review. 70 F.3d at 421.

The Anaconda court, in turn, was faced with a company seeking to vacate the decision of an arbitrator on a dispute which arose under a collective bargaining agreement between the company and the defendant union. 693 F.2d at 36. The court specifically noted that

> [t]he parties have bargained for the arbitrator's decision, not the court's, and that decision should be upheld unless it fails to draw its essence from the collective bargaining agreement.'

Id. at 37, quoting United Steelworkers of America v. Enterprise Wheel & Car Co., 363 U.S. 593 (1963). The court went on to note that the parties had agreed both to the language being interpreted and that it would be an arbitrator making the interpretation. Id. Based on the strong federal policy favoring labor arbitration, the court concluded that manifest disregard of the law requires more than a mere misapplication of the law or mistaken interpretation. Id. at 37-38.

Thus, the line of deferential review of arbitration decisions in the Sixth Circuit is clearly traced to the historically narrow review of arbitration decisions allowed by the United States Supreme Court in labor arbitrations, as set forth in the Steelworkers trilogy and its progeny. In that line of cases, the Supreme Court recognized that historically the "collective bargaining agreement is an effort to erect a system of industrial self-government", United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574, 580 (1960), and the "grievance [and arbitration] machinery is at the very heart of the system of self-government." Id., at 581. This Court went onto recognize that labor arbitrators "perform functions which are not normal to the courts; the considerations which help him fashion judgments may indeed

be foreign to the competence of courts." Id. Thus, "the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining agreement process", United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960), and their awards may not be touched without seriously undermining the efficacy of the national labor policy of settling disputes by arbitration instead of strikes, lockouts and industrial conflict. Id., at 599. See also United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

In the setting of Mrs. Buchignani's case, none of the policies which support a narrow or deferential standard of review are applicable. As has been previously shown, the clear policy underlying the passage of the Civil Rights Act of 1964 and all of its subsequent amendments has been for meaningful judicial review of the underlying claim. The policy of seeking to eliminate discriminatory barriers to employment has been recognized and clearly enunciated by both this Court and every session of the United States Congress to pass on this issue. Title VII claims have dealt with issues of personal dignity and equal protection, not the types of economic rights that are found in other statutory schemes such as RICO or securities legislation.

The policies of Title VII are clearly contrary to the federal labor policy previously set out. Contrary to seeking to foster a system of self-government, the national public policy against discrimination is firmly rooted in the judiciary. As has been previously pointed out, the courts have recognized this and Congress has affirmed it. Thus, the foundation upon which the authority for the review utilized by the lower courts in examining the arbitration panel's decision is in conflict with the underlying federal policy seeking to combat workplace discrimination and cannot stand.

Conclusion

Based on the foregoing, it is clear that this Court should exercise its authority to review the decision of the Sixth Circuit Court of Appeals in this case to resolve the many conflicts created by the deferential standard of review which that court has endorsed for civil rights arbitrations, and ultimately vacate and reverse the orders entered below and remand this case to the district court for trial.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARY BUCHIGNANI,

Plaintiff,

v. No. 96-2586-GA

VINING-SPARKS IBG LIMITED PARTNERSHIP
a Tennessee Limited Partnership;
VINING-SPARKS SECURITIES, INC.,
a Tennessee Corporation; and
JAMES L. VINING, Individually,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO VACATE NASD ARBITRATION PANEL AWARD AND GRANTING DEFENDANT'S MOTION TO CONFIRM AWARD

Before the court is plaintiff Mary Buchignani's motion pursuant to 9 U.S.C. § 1 et seq. (1994) to vacate the award of the National Association of Securities Dealers ("NASD") arbitration panel, and defendants Vining-Sparks IBG Limited Partnership ("VSIBG"), Vining Sparks

Securities, Inc. ("Vining-Sparks"), and James L. Vining's motion pursuant to 9 U.S.C. § 9 to confirm the arbitration award. Buchignani filed this motion on March 6, 1998, alleging that the NASD arbitration panel award of December 3, 1997 showed "manifest disregard of the law" and that the award violated clear public policy. Defendants maintain that there were several rational bases for the decision and ask the court to confirm the arbitration award.

On June 5, 1996, Buchignani filed an action against defendants in this court alleging violations of Title VII of the 1964 Civil Rights Act., 42 U.S.C. § 621 et seq. Buchignani was employed as a senior vice president and registered securities broker/representative for Vining Sparks when she was terminated on March 20, 1995. In the course of her thirteen-year employment with VSIBG and its predecessor company, Vining-Sparks, Buchignani alleges she was subjected to sexual harassment, gender discrimination, and retaliatory discharge. In response, defendants filed a motion

to stay the proceedings and to compel arbitration of the dispute pursuant to the terms of a Form U-4 which Buchignani signed as a condition of her employment. On August 12, 1996, this court found the arbitration agreement enforceable and granted defendants' motion to stay litigation and to compel arbitration. A three-member NASD arbitration panel heard Buchignani's claims on November 4-6, 1997. On December 3, 1997, the arbitration panel issued an award in favor of the defendants. The decision of the arbitration panel did not issue findings of fact or conclusions of law, nor did it provide any specific bases for its decision. The award read:

> After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:
>
> It is the unanimous decision of the panel that the Claimant failed to carry her burden of proof and her claims for damages are denied with prejudice. It is the further decision of the panel that any prayer for attorney's fees by Claimant or

Respondents are denied with prejudice.

(Pl. Mot., Ex. A).

The scope of judicial review of arbitration awards is extremely narrow. A federal court may set aside an award of an arbitration panel only in limited circumstances. The Federal Arbitration Act., 9 U.S.C. §§ 10 and 11, sets forth several narrowly defined statutory bases for vacating or modifying an arbitration award.[1] In addition to the statutory bases for vacating an arbitration award, there is also a judicially-created basis for vacating an arbitration award where the award was made "in manifest disregard of the law." See Wilko v. Swan, 346 U.S. 427 (1953), overruled on other grounds, Rodriquez de Quijas v. Shearson/American

[1] Section 10 of the Act provides that a district court may vacate an arbitration award: (1) where the award was procured by fraud, corruption, or undue means, (2) where there was evident partiality or corruption in the arbitrators, (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, or in refusing to hear evidence, or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that an award upon the subject matter submitted was not made. 9 U.S.C. § 10. Section 11 of the Act permits modification or correction of an award that has evident material miscalculations, decides a matter not submitted to the arbitrators, or has an imperfection not affecting the merits. 9 U.S.C. § 11.

Express, 490 U.S. 477 (1989); Merrill Lynch, Pierce, Fenner & Smith v. Jaros, 70 F.3d 418 (6th Cir. 1995). Buchignani does not contend that the statutory grounds apply to set aside the arbitration award, but instead, she asserts that the award of the arbitration panel should be vacated because the panel acted with "manifest disregard of the law" in reaching its decision.

The Supreme Court has not explicitly defined the term "manifest disregard of the law," and the circuits have crafted various definitions. See Cole v. Burns Intern. Security Servc., 105 F.3d 1465, 1487 n.20 (D.C. Cir. 1997) (listing various circuits' definitions of "manifest disregard of the law"). In the Sixth Circuit, the "manifest disregard of the law" standard is an extremely narrow standard of review. See Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995), citing Anaconda Co. v. District Lodge No. 27, 693 F.2d 35 (6th Cir. 1982). In determining whether the arbitration panel acted with manifest disregard of

the law, evidence that there was an error in interpretation or application of the law is insufficient to meet this standard. "Rather, the decision must fly in the face of clearly established legal precedent." Id. at 421.

In Merrill Lynch, as in this case, the arbitration gave no explanation for the holding of the award. In denying the motion to vacate the award, the court stated that when the arbitrators decline to explain their reasoning,

> a party seeking to have the award set aside faces a tremendous obstacle. If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as that arbitrators must the award be set aside.

Id. at 421, citing Storer Broadcasting Co. v. Am. Federation of Television and Radio Artists, 600 F.2d 45 (6th Cir. 1979); Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992). The court continued that, "[w]hen faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly

defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." Merrill Lynch, 70 F.3d at 421.

Because of the narrowness of review of arbitration awards, Buchignani urges the court to adopt a "heightened" manifest disregard of law standard as set forth in Cole v. Burns Intern. Security Serve., 105 F.3d 1465 (D.C. Cir. 1997). Under Buchignani's proposed standard, in cases where individuals are compelled to sign arbitration agreements as a condition of employment and have federal statutory claims, the court should "apply a standard of review that is sufficiently rigorous to ensure that the arbitration panel has correctly applied the statutory standards in resolving the claim." (Pl. Mot. at 17). Buchignani argues that under this "heightened" standard, the arbitration panel's failure to explain their award was clearly in manifest disregard of the law because a court reviewing the decision would have no

basis to determine whether the arbitrators properly interpreted and applied statutory law. (Pl. Mot. at 19).

This court declines to create another standard of judicial review for "manifest disregard of law." Sixth Circuit authority clearly dictates great deference to an arbitrator's decision. This judicially created standard is "very narrow" and "even a misapplication of well defined and explicit legal principles does not constitute manifest disregard." Merrill Lynch, 70 F.3d at 421. Further,. The Cole decision which Buchignani urges the court to adopt, did not turn on a motion to vacate, but rather on a motion to compel arbitration. Only in dicta did the Cole court discuss the heightened standard of review of arbitration awards for statutory claims. Cole, 105 F.3d at1487. Moreover, the Cole court stated that the heightened standard of review would apply only in "cases in which novel or difficult legal issues are presented demanding judicial judgment." Id. Thus, the proper standard of review

in this case is limited to that articulated by existing Sixth Circuit authority.

Buchignani also argues that the arbitration award should be vacated under the current "manifest disregard of law" standard. Buchignani contends that the arbitration panel acted in manifest disregard of the law because the "only inference" to be drawn from the decision is that the arbitration panel found that she failed to establish a prima facie case for gender discrimination, hostile work environment, and retaliation. (Pl. Mot. at 20). Buchignani asserts that the evidence she presented before the arbitration panel clearly shows that she established her prima facie burden of proof under the analysis of McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To arrive at this conclusion, Buchignani relies on the language of the award that, "[i]t is the unanimous decision of the panel that the Claimant *failed to carry her burden of proof* and her claims for damages are denied with prejudice." (emphasis added).

The court finds that this interpretation of the language "claimant failed to carry her burden of proof" to be highly implausible. The only reasonable interpretation is that the arbitration panel determined that she failed to carry her burden of showing the defendants liable under her various discrimination theories. The arbitration panel was not merely considering whether Buchignani proved a prima facie case, but was deciding the entirety of her claims. It is clear that Buchignani misconstrues the arbitrators' language.

Reviewing the arbitration award under the "manifest disregard of law" standard, the court finds that the arbitration award must be upheld. The court finds that the award was legally plausible and "not so patently contrary to establish legal precedents as to necessitate that the award be vacated." Merrill Lynch, 70 F.3d at 422. The arbitration panel reviewed pre-hearing memorandum of law which set forth the applicable statutes and case law which each party considered relevant. The panel listened to three days of

testimony and arguments presented by both parties. There is no evidence that the arbitration panel chose to ignore these legal principles in reaching their decision. Buchignani admits as much when she acknowledges that, "It is conceivable that the arbitration panel resolved the case in accordance [with] the substantive Title VII law." (Pl. Mot. at18). Given the highly factual nature of the case, there is ample basis from the evidence before the arbitration panel to conclude that Buchignani did not satisfy her burden of proving her claims of sexual discrimination, hostile work environment, and retaliation.

Buchignani also argues that the arbitration panel award violates the public policies of Title VII by failing to provide her with remedies otherwise provided by federal discrimination statues. To support her claim, Buchignani merely rehashes arguments that this court has already considered and rejected. Therefore, the court DENIES plaintiff's motion to vacate the arbitration award and

GRANTS defendants' motion to confirm the arbitration award.

IT IS SO ORDERED.

s/ Julie Smith Gibbons
United States District Judge

October 29, 1998
Date

NOT RECOMMENDED FOR PUBLICATION
No. 98-6692

UNITED STATES COURT OF APPEALS
FOR THTE SIXTH CIRCUIT

MARY BUCHIGNANI,

Plaintiff-Appellant,

v.

ON APPEAL FROM T
UNITED STATES
DISTRICT COURT FO
THE WESTERN
DISTRICT OF
TENNESSEE

VINING-SPARKS IBG, A LIMITED
PARTNERSHIP,
a Tennessee Limited Partnership; and
VINING SPARKS SECURITIES, INC.,

Defendants-Appellees.

March 2, 2000, Filed

BEFORE: KRUPANSKY and NORRIS, Circuit Judges, and GWIN, District Judge.*

PER CURIAM. Plaintiff Mary Buchignani appeals a district court refusal to set aside or modify an arbitration

---

* The Honorable James S. Gwin, District Judge for the Northern District of Ohio, sitting by designation.

decision rendered by the National Association of Securities Dealers ("NASD"). The arbitrated conflict concerned age discrimination claims along with Title VII sexual and religious discrimination claims. Plaintiff submitted the claims to arbitration in compliance with provisions in her employment contract. Plaintiff now seeks reversal of current sixth circuit precedent governing the standard for setting aside arbitration decisions. In the alternative, she contends that the district court erred in applying the sixth circuit precedent.

We affirm based upon the opinion of the district court.

Background

The facts have been adequately summarized by the district court. Prior to her March 20, 1995 termination, Buchignani was employed as a senior vice president and registered securities broker/representative for Vining-Sparks IBG ("VSIGB"). On June 5, 1996 Buchignani filed an action against VSIBG and Vining Sparks Securities, Inc. ("VSS"). She alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2000e-17 (1999), and the Age Discrimination in Employment Act, 29 U.S.C.A. § 621-43 (1999).

Buchignani alleged that during the course of her thirteen-year employment with VSIBG and its predecessor company, VSS, she was subject to sexual harassment, gender discrimination, religious discrimination, age discrimination, and retaliatory discharge. In response, defendants filed a motion to stay the proceedings. Defendants sought to compel arbitration of the dispute pursuant to the terms of an agreement which Buchignani signed as a condition of her employment. On August 13, 1996, the district court found the arbitration agreement enforceable. It granted defendant's motion to stay litigation and compel arbitration. A three-member NASD arbitration panel subsequently heard Buchignani's claims on November 4-6, 1997. On December 3, 1997, the arbitration panel issued an award in favor of the defendants. The decision of the arbitration panel did not provide findings of fact or conclusions of law, nor did it otherwise state any specific bases for its decision. The award read:

After considering the pleadings, the testimony, an the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

It is the unanimous decision of the panel that the Claimant failed to carry her burden of proof and her claims for damages are denied with prejudice. It is the further decision of the panel that any prayer[s] for attorney's fees by Claimant or Respondents are denied with prejudice.

The Federal Arbitration Act provides that a district court may vacate an arbitration award if there was 1) :corruption, fraud or undue means" in the procuring of the award, 2) "evident partiality or corruption in the arbitrators," 3) arbitrator misconduct in refusing to postpone a hearing or hear evidence or 4) arbitrator action in excess of legitimate authority, and/or a failure to give an "award upon the subject matter submitted." 9 U.S.C.A. § 10 (1999). The plaintiff did not contest the arbitration award under the Act, but instead asserted an additional judicially-created ground for vacating or modifying an arbitration award. This judicially-created basis can be invoked where an award has been made "in

manifest disregard of the law." *Merril Lynch, Pierce, Fenner & Smith, Inc. v. Jaros,* 70 F.3d 418, 421 (6th Cir. 1995) (citing *Wilko v. Swan,* 346 U.S. 427, 436-37 (1953)), *overruled on other grounds by, Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989).

Quoting *Merrill Lynch,* 70 F.3d at 421, the district court correctly determined that the governing sixth circuit "manifest disregard of the law" standard for vacating an arbitration decision requires that "'the [arbitration] decision must fly in the face of clearly established legal precedent.'" Questions of law are decided with manifest disregard only if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Merrill Lynch,* 70 F.3d at 421. The district court noted that, like the instant case, *Merrill Lynch* involved a fact pattern where "the arbitrators gave no explanation for the holding of the award." *Merrill Lynch* explains that when the arbitrator gives no explanation,

> .a party seeking to have the award set aside faces a tremendous obstacle. If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.

Merrill Lynch, 70 F.3d at 421.

The district court refused to set aside the arbitration panel's decision. The court's opinion applied the sixth circuit's very narrow "manifest disregard of the law" standard for setting aside arbitration decisions. The court concluded that the arbitration panel had not demonstrated a manifest disregard of the law in its ruling against plaintiff. The court also declined the invitation to "create another [heightened] standard of judicial review," which plaintiff preffered as part of her interpretation of *Cole v. Burns International Security Services,* 105F.3d 1465 (D.C. Cir. 1997), in place of the sixth circuit's "manifest disregard of the law" standard.

The district court was correct. *Merrill Lynch* is governing precedent in the sixth circuit. Plaintiff attempts to evade the constraints of *Merrill Lynch* by redefining its strictures to a point where they would lack any practical significance. Plaintiff suggests that the reviewing court "must examine not only the result of the arbitration panel, but also the reasons for the decision reached to determine if the statutory claim being presented was indeed dealt with as mandated by federal law". Plaintiff presses even further still: the "manifest disregard of the law standard" must "allow the district court the freedom to independently examine the record of the case and determine independently the correctness of the arbitration panel's decision". It seems to us that plaintiff is really suggesting that *Merrill Lynch* permits *de novo* review of arbitration. That reading of *Merrill Lynch* is incorrect and would involve our overruling *Merrill Lynch* rather than applying it.

The Equal Employment Opportunity Commission, as amicus curiae, is more candid in acknowledging the fact that, for plaintiff to prevail, *Merrill Lynch* and its progeny must be overturned. Even if this panel agreed with that reasoning, only an *en banc* review could reverse the holding of *Merrill Lynch*. *Hamlin v. Charter Township of Flint,* 165 F.3d 426, 430 (6th Cir. 1999).

The Order of the District Court is **AFFIRMED.**

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Mary Buchingnani,

Claimant,

v. 96-04401

Vining-Sparks IBG, Limited Partnership,
Vining-Sparks Securities, Inc. and
James Vining,

Respondents.

REPRESENTATION OF PARTIES

Mary Buchingnani ("**Claimant**") was represented by Alan G. Crone, Esq. of Wilder, Crone, Johnston, Mason & Goodwin, P.L.C., Memphis, Tennessee.

Vining-Sparks IBG, Limited Partnership, Vining-Sparks Securities, Inc. and James Vining ("**Respondents**") were represented by Charles W. Hill, Esq., of Waring Cox, P.L.C., Memphis, Tennessee.

CASE INFORMATION

Claimant filed the Statement of Claim on or about September 17, 1996. Claimant signed the Submission Agreement on September 17, 1996 and November 1, 1996.

Respondents filed the Statement of Answer on or about December 11, 1996. Respondents signed their Submission Agreements on November 27, 1996.

The parties Statement of Agreement to Arbitrate Pursuant to Section 46 of the NASD Code was filed on or about September 6, 1997.

The parties' Second Joint Stipulation was filed with the NASD Regulation Office of Dispute Resolution, prior to hearing, wherein Claimant's claims against Mr. James Vining, as an individual, arising only under Title VII were withdrawn.

HEARING INFORMATION

Telephonic pre-hearing conferences were held on August 28, 1997 for one (1) session and October 21, 1997 for one (1) session.

The Arbitration Panel held a hearing on November 4, 1997 for two (2) sessions, November 5, 1997 and for two (2) sessions, and November 6, 1997 for one (1) session in Memphis, Tennessee for a total of five (5) sessions.

CASE SUMMARY

Claimant brought this arbitration against the Respondents for the following alleged violations of her Civil Rights. Gender discrimination; hostile work environment; and reprisal and retaliatory discharge. All of the claims were brought pursuant to 42 U.S.C. § 2000e et seq.

Specifically, Claimant alleged that: She, and other female employees, were subjected to unwanted and unwelcome sexual conduct and conditions that created an

offensive and hostile working environment; the environment was so pervasive that Respondents' management knew or should have known about the unreasonable conditions to which the female employees were subjected; these activities had the effect of unreasonable interfering with her work performance; Respondents maintained a "glass ceiling" in effect, whereby no female employee was able to advance into executive positions or other positions of authority; Respondents systematically discriminated against women, never allowing any to advance into positions of authority and executive management; Claimant attempted to break the "glass ceiling" by informing Respondents of the treatment of women in the workplace and that she, or other women, needed to be considered for promotions, and was summarily fired; Claimant reported all of the aforementioned activities, in numerous meetings, to Respondents' management and suggested that as a senior female professional, she be given some role and authority in eliminating the discriminatory conduct and harassment; and after Claimant made the statements to Respondents, they began a systematic campaign to punish her for voicing her opinion which ended in her discharge on or about March 20, 1996.

Unless specifically admitted in their Answer, Respondents denied the allegations set forth in the Statement of Claim. Respondents asserted the following defenses: As a matter of law, the Statement of Claim fails to state claims for which relief can be granted; the Statement of Claim fails to state a claim or claims for relief against Respondent, James L. Vining, individually, because as a matter of law, neither Title VII of the Civil Rights Act of 1964 (42 USC §§2000e et seq.) provide for an action against an individual; the Statement of claim fails to state a claim against Vining-Sparks Securities, Inc. due to the fact that Claimant was employed at the time of her termination by Vining-sparks IBG (VSIBG) and as a matter of law, Claimant's Title VII

and ADEA claims can only be pursued against her employer, VSIBG and not the general partner, Vining-Sparks Securities, Inc.; to the extent the Statement of Claim seeks to pursue claims for relief for incidents occurring prior to 300 days prior to September 13, 1995, such claims are time-barred and failed to state a claim for relief; any and all claims set forth in the Statement of Claim that were not the subject of the charge of discrimination filed by the Claimant with the Equal Employment Opportunity Commission are barred; and to the extent the Statement of Claim seeks recovery for alleged mental, emotional and physical injuries suffered by the Claimant, such claims fail to state a claim for relief.

RELIEF REQUESTED

Claimant requested an award of the following damages: All back pay from the time of termination in the amount of $373,610, plus pre-judgement interest from the time of her termination; front pay compensation for Respondents' failure to promote her to an executive position, in the amount of $6,788,823, or in the alternative, front pay for loss of future earnings for a bond sales person in the amount of $2,295,861, plus pre-judgement interest from the time of her termination; compensation for loss of income derived from the profit sharing benefits package and employee partnership units in an amount to be proven at the arbitration, plus pre-judgement interest from the time of her termination; compensatory damages for mental and psychiatric injuries sustained as a proximate cause of the Respondents' actions which caused permanent damages to the Claimant in the amount of $200,000; punitive damages of $200,000 per Respondent, per claim; her attorney's fees and cost of bringing this action, in an amount to be proven upon her vindication; and all other relief deemed just and equitable.

Respondents asked the panel to: Dismiss the claims of the Claimant in their entirety and rule that Claimant not be awarded any compensatory, punitive or any other monetary damages; award Respondents their costs, including reasonable attorney's fees; award Respondents recovery for forum fees, assessments and charges imposed in connection with these proceedings; and the Respondents be awarded such other and further relief to which they showed themselves entitled.

OTHER ISSUES CONSIDERED & DECIDED

On or about October 15, 1997, Respondent Vining-Sparks Securities, Inc. filed a Motion to Dismiss it from these proceedings. Claimant filed her response on or about October 20, 1997. After review of the documents and deliberations, the arbitrators denied the motion.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

It is the unanimous decision of the panel that the Claimant failed to carry her burden of proof and her claims for damages are denied with prejudice. It is the further

decision of the panel that any prayer for attorney's fees by Claimant or Respondents are denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of $1,000 per hearing session and $300 for each pre-hearing conference, if any. There were two (2) pre-hearing sessions @ $300 per session and five (5) hearing sessions x $1,000 = $5,600 in forum fees. Pursuant to Rule 10332(b) of the Code of Arbitration Procedure (the "Code") a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to Rule 10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of $500 and shall **retain** as forum fees the hearing session deposit in the amount of $1,000 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of $500 previously paid by the Respondents.

Additional forum fees in the amount of $3,600 ($5,600 - $1,000 deposit - $1,000 overpayment of surcharge) are assessed by the arbitrators against Respondents.

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Dated:

Jack F. Marlow /s/ December 3, 1997
Jack F. Marlow
Public Arbitrator, Presiding Chair

Rosemarie L. Bryan /s/ December 4, 1997
Rosemarie L. Bryan
Public Arbitrator

Phil Lubetkin /s/ December 4, 1997
Phil Lubetkin
Industry Arbitrator

FILED
MAY 01, 2000
LEONARD GREE
Clerk

98-6692

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARY BUCHIGNANI, Plaintiff-Appellant, v. VINING-SPARKS IBG, A LIMITED PARTNERSHIP, A TENNESSEE LIMITED PARTNERSHIP, ET AL., Defendants-Appellees.	)	ORDER

BEFORE: KRUPANSKY and NORRIS, Circuit Judges; and GWIN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members, but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission an decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green*

Leonard Green, Clerk

---

* Hon. James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

Supreme Court, U.S.
FILED
OCT - 6 2000
CLERK

(2)

No. 00-221

IN THE

Supreme Court of the United States

MARY BUCHIGNANI,

Petitioner,

v.

VINING SPARKS, IBG, a Limited Partnership
and VINING SPARKS SECURITIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Vining Sparks Securities, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent, Vining Sparks, IBG, is a Tennessee limited partnership. Vining Sparks Securities, Inc. is the general partner of this partnership, and Union Planters Corporation, a publicly held company, is the limited partner.

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RESPONSE TO PETITIONER'S STATEMENT OF MATERIAL FACTS

Litigation is, by its very nature, generally a contentious undertaking, and it is thus not surprising that Respondents Vining Sparks, IBG and Vining Sparks Securities, Inc. (collectively "Vining Sparks") take issue with a number of the "material facts" presented in the Petition for Writ of Certiorari prepared by Petitioner Mary Buchignani ("Buchignani"). It is, in addition, beyond dispute that this Court does not ordinarily see fit to moderate the parties' divergent view of the relevant circumstances. In the present scenario, however — in which Buchignani questions the utility of the arbitration process at least in part on the strength of her contention that a wealth of "unrebutted" testimony demonstrated the "severity" and "pervasiveness" of the discrimination and harassment to which she allegedly was subjected — it is worthwhile, and even necessary, to point out that the facts before the arbitrators were not, in truth, so one-sided. To the contrary, as exhibited by the examples contained in the succeeding paragraphs, Vining Sparks vigorously defended against Buchignani's claims by, among other things, presenting evidence to rebut virtually every facet of her Title VII case.

To begin with, as particularly relevant to Buchignani's charges of harassment, it is significant that she confirmed her own use of vulgar language and profanity while on the securities trading floor. Buchignani further acknowledged that the sales area represented a "raucous environment, male and female," and she admitted displaying a poster in her cubicle indicating that "sexual harassment will not be discouraged, however, it will be graded." Further proof exposed Buchignani's primary complaints as generalizations

describing incidents scattered over a ten year period of employment, and other females employed by Vining Sparks offered that the trading environment, while stressful, was not hostile, offensive, degrading, or demeaning in a sexual sense. Finally, Buchignani admitted she never heard the corporate CEO use sexually vulgar language, and there was ample proof to justify a conclusion that Vining Sparks responded appropriately to complaints of sexual harassment or discrimination.

Vining Sparks also mounted a serious challenge to Buchignani's cause of action for "disparate treatment" discrimination. For instance, the CEO of Vining Sparks offered Buchignani an opportunity to manage the second largest branch in the company — a position with compensation potential approaching $400,000 per year — but she declined to accept this post. Buchignani also passed on other prospects for advancement within the company, including jobs with responsibilities which combined managerial and financial skills. Moreover, while it is true that the CEO denied Buchignani's petition for creation of a special executive level management position just for her, he also denied a similar request from a male sales representative who wished to leave the sales floor. And, to counter whatever inference Buchignani has attempted to draw from the company's selection of a male replacement for the retiring director of sales, Vining Sparks adverted, inter alia, that the chosen successor had superior knowledge of company products and customers and was the direct subordinate of the departing director.

So, too, were the facts hotly contested with respect to the portion of Buchignani's case alleging retaliatory discharge. Along these lines, Vining Sparks emphasized that

Buchignani failed to articulate a specific complaint of sexual discrimination until after her February 1994 plea for a career change. Within one year of making this request, Buchignani began working irregular hours, sometimes not reporting to duty until 3:00 p.m. Thereafter, when Buchignani became confrontational with a coworker, the company's CEO sought to counsel her. Buchignani responded insubordinately to this gesture by walking out on the CEO and launching into an obscenity filled tirade against her coworker. Upon hearing her superiors' suggestion that a temporary leave might be appropriate, Buchignani stormed out of the building and subsequently informed the director of human resources that she had quit employment.

From these *isolated* examples of the contradictory proof presented at the hearing, it is easy to see why the district court termed this a "highly factual" case which included evidence sufficient to disprove each of Buchignani's theories for recovery. Buchignani herself admits as much by recognizing that the arbitration panel might conceivably have "resolved the case in accordance [with] the substantive Title VII law." To put it simply, three NASD approved arbitrators — two of whom were licensed attorneys, one with extensive general litigation experience and the other with a significant discrimination law background — have sifted through the facts, and four Article III federal judges have reviewed the record in crafting and upholding the award in favor of Vining Sparks. It is unnecessary for this Court to undertake the same review. This Court should deny Buchignani's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE STANDARD FOR REVIEW OF ARBITRATION AWARDS ADOPTED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Buchignani readily concedes that her sole ground for seeking to overturn the award of the NASD arbitration panel is predicated on the "manifest disregard of the law" framework referenced by this Court in cases such as *First Options, Inc. v. Kaplan*, 514 U.S. 938 (1995). Applying the formulation of this standard utilized by the United States Court of Appeals for the Sixth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418 (6th Cir. 1995), the district court concluded that the results of arbitration may be vacated only if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle," *id.* at 421. Contrary to what Buchignani has argued in this Court, the Sixth Circuit's application in Title VII cases of this judicially created rule does not conflict with decisions issued by the other circuit courts of appeals.

In attempting to create a circuit conflict, Buchignani chiefly relies on the opinion issued by the United States Court of Appeals for the District of Columbia Circuit in *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). The *Cole* opinion, however, by no means suggests any hostility toward a deferential standard of review in Title VII arbitration matters. As an initial point, the case did not even involve

consideration of an arbitration award, but was instead an appeal from the district court's order compelling arbitration. *See id.* at 1467-70. Moreover, although dicta from the opinion indicates that where "novel or difficult legal issues are presented" a court should be "empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct," the D.C. Circuit at the same time observed that "[m]ost employment discrimination claims are entirely factual in nature and involve well-settled legal principles." *Id.* at 1487. Thus, while it is, at this point, speculative — at best — that a circuit conflict could materialize should the D.C. Circuit ultimately approve a heightened standard of review for arbitration awards implicating "novel or difficult legal issues," it is all but certain that factually intensive cases such as the present would be unaffected by any such disharmony.

Citing *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752 (5th Cir. 1999), Buchignani also contends that the United States Court of Appeals for the Fifth Circuit has, as compared to the Sixth Circuit, more liberally construed the meaning of "manifest disregard of the law." In truth, however, *Williams* provides even less support for a circuit conflict than *Cole*. To be sure, the *Williams* court did agree with the D.C. Circuit that "in [the] context [of statutory discrimination claims], the manifest disregard of the law standard must be defined in light of the bases underlying the [relevant Supreme Court decisions]." *Id.* at 762 (quotations omitted). After making this rather unexceptional pronouncement, however, the court proceeded to affirm the confirmation of a written award which, like Buchignani's, "fully state[d] the issues submitted and the conclusions reached, but . . . g[a]ve[] no rationale or reasons for the decision." *Id.* at 757. In doing so, the court used a standard substantially similar to the one

employed by the Sixth Circuit in *Merrill Lynch*. *See id.* at 762 ("First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld."). If anything, then, the Fifth Circuit has offered its implicit support for a deferential standard of review even where the arbitrators furnish no explanation for their decision.

To summarize, Buchignani is incorrect to the extent she argues a circuit conflict exists with respect to the manifest disregard of the law standard. In fact, though the other circuits have used slightly different terms to describe their various conceptions of the rule, they have adopted formulations which are virtually identical — as a matter of substance — to the standard approved in *Merrill Lynch*. *See, e.g.*, *Williams*, 197 F.3d at 762 ("First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld."); *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) ("[T]here must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did."); *Advest Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) ("[An arbitration award may be vacated] where it is clear from the record that the arbitrator recognized the applicable law and then ignored it."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986) ("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal

principle but decides to ignore or pay no attention to it."). Given what is, in reality, a virtual consensus on the meaning of "manifest disregard of the law," this Court should reject Buchignani's claim that a circuit split exists on this issue.

II.

THE SIXTH CIRCUIT'S DEFERENTIAL STANDARD OF REVIEW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *GILMER v. INTERSTATE/JOHNSON LANE CORP.*

Buchignani additionally posits that the standard used by the Sixth Circuit to review arbitration awards is inconsistent with this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). With all due respect, Buchignani is once again mistaken. In *Gilmer*, this Court held that an employer may enforce its employee's agreement to arbitrate disputes arising under the Age Discrimination in Employment Act of 1967 (the "ADEA"). *See id.* at 35. Responding to the petitioner employee's assertion that it would be inappropriate to arbitrate ADEA claims in light of the important social policies served by that statute, this Court repeated that " 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.' " *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) (initial alteration omitted). Buchignani has seized upon this excerpt to aver that a deferential standard of review cannot ensure that a party's rights have, in fact, been vindicated through arbitration.

In essence, Buchignani is arguing that the arbitral forum cannot be trusted and that intensive judicial review — especially where statutory claims are involved — is necessary to ensure that the arbitrators are properly performing their jobs. This, however, represents the type of unwarranted suspicion of the arbitration process that was categorically rejected in *Gilmer* and other cases as being " 'far out of step with [this Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes.' " *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). Furthermore, the employee in *Gilmer*, like Buchignani, maintained that judicial review of arbitration decisions is "too limited," which prompted this Court to reply that the system in place — which was described as "*necessarily* . . . limited" — is "sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Id.* at 32 n.4 (emphasis added) (quotation omitted). This reasoning is absolutely fatal to Buchignani's suggestion that — in the absence of some heightened standard of review — submission of a matter to arbitration necessarily implies the loss of a party's substantive statutory rights.

Moreover, the empirical evidence absolutely debunks whatever misgivings Buchignani might have about the ability of arbitration to vindicate an employee's statutory rights. Exactly on point is a recent article by the former director of the American Civil Liberty Union's National Task Force on Civil Liberties in the Workplace. *See* Lewis Malby, *Employment Arbitration, Is It Really Second Class Justice?*, Disp. Resol. Mag., Fall 1999, at 23. Mr. Malby's study compares the results of employment arbitration conducted by the American Arbitration Association with litigation results and concludes that "far more employees win in

arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." *Id.* at 24. A similar survey contrasted (i) the outcomes for all employment discrimination cases filed and resolved in the United States District Court for the Southern District of New York for the period April 1, 1997 to November 30, 1999 with (ii) securities industry arbitration awards based on available National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE") arbitration awards involving discrimination claims during the same time period. *See* Michael Delikat, *An Empirical Study of Dispute Resolution Mechanisms for Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, Alternative Dispute Resolution in the Employment Arena, Proceedings, 53d Annual NYU Conference on Labor (S. Estreicher, Editor, forthcoming 2000). Mr. Delikat reports that employees in arbitration before the NASD and NYSE prevailed in forty-eight percent of the cases filed, yet only thirty percent of all employees filing discrimination cases in the United States District Court for the Southern District of New York prevailed in litigation. *Id.*

It is, in the end, apparent that the Sixth Circuit's interpretation of the "manifest disregard of the law" standard is in complete accord with this Court's recent opinions in this field. Buchignani's distrust of the arbitration process is not only inconsistent with the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), but is also refuted by the available empirical studies. Such being the case, this Court should deny Buchignani's Petition for Writ of Certiorari.

III.

THIS COURT SHOULD SUMMARILY REJECT THE REMAINING GROUNDS OFFERED BY BUCHIGNANI IN SUPPORT OF HER PETITION FOR WRIT OF CERTIORARI

Buchignani also asks this Court to grant her petition based on the legislative history of Title VII and for reasons of public policy. It is, in the first place, questionable whether Buchignani properly developed either of these arguments when challenging before the Sixth Circuit the standard of review used by the district court. Thus, it may not be appropriate for this Court to consider the points at this juncture. *Cf. Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). Furthermore, each of these grounds is premised upon Buchignani's implicit assertion that the standard of review for Title VII arbitration should differ from the analysis used when evaluating the arbitration of other types of statutory claims. Buchignani has not, however, provided any defensible justification for — in the arbitration context — treating Title VII any differently from RICO, the securities laws, or multiple other statutes "designed to advance important public policies." *Gilmer*, 500 U.S. at 28. In a nutshell, these additional contentions presented by Buchignani provide no basis for granting the Petition for Writ of Certiorari.

CONCLUSION

The Sixth Circuit reviews arbitration awards involving Title VII claims in a manner that is consistent with the opinions of this Court and the other federal courts of appeals. Consequently, for the reasons explained in this brief, the Court should deny Buchignani's Petition for Writ of Certiorari.

Respectfully submitted,

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